JUNE 2020 CASE LAW UPDATE

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1. INTRODUCTION

1.1 This note deals with three interesting cases from the last three months. It is no substitute for specialist legal advice. I have deliberately avoided any consideration of COVID-19 and the various authorities that have arisen from that crisis; there are many notes on the principles that have emerged, including several which may be downloaded from the Oriel Chambers website. Instead, this note focuses on the emergence and continuance of principles which are hopefully of interest and use to practitioners; pandemic or no.

2. POSSIBLE RESURGENCE OF COMPENSATION

- *RC v JC [2020] EWHC 466 (Fam) (Mr Justice Moor)*

2.1 This case thrusts "compensation" back to the fore in financial remedy proceedings. H and W were married (including cohabitation) for 11 years. There were two children to the marriage, aged 8 and 10. When they met H and W were both working as solicitors (H was an associate and W was a trainee). As of 2020, H was earning just shy of £1m per annum.

2.2 The most novel point considered in this case was relationship generated disadvantage. Following the joint decision to have children, W left the firm at which both she and H worked and took an in-house role at a bank for less money with fewer prospects. It was her case that she was destined for partnership in the firm, but that they agreed to sacrifice her career prospects to allow her to move to a job where she could be a hands-on mother. H disputed this. He argued that her health would have made her a poor prospect for advancement; and that he had suggested rather than stepping down career-wise, she step across to another magic circle firm which would likely welcome her.

2.3 W argued that she should receive periodical payments of £360k per annum by way of compensation for relationship generated disadvantage, index linked and payable on a joint lives basis.

2.4 Having set out the section 25 factors, Moor J considered the applicable case law. Within his judgment and specifically when considering relationship-generated disadvantage he made reference to *Miller/McFarlane* [2006] UKHL 24 and *Waggott v Waggott* [2018] EWCA Civ 727. He went on to make the following findings:

i. That the wife "stood a very good chance" of becoming a partner, which would have brought her income into step with that of H [para 50];
ii. That she gave up "the chance, as opposed to the certainty, of far higher remuneration." [53]. His lordship was clear that it was a chance, not a certainty [67];
iii. At the very least, H "went along with that decision" [53].

2.5 He went on: *"I accept that it is unusual to find significant relationship generated disadvantage that may lead to a claim for compensation, but I am clear that this is one such case. The Wife gave up her legal career, with the support of the husband."* [63]

2.6 His finding of relationship generated disadvantage underpinned the whole of His Lordship's analysis of need, compensation and sharing [61, 63].

2.7 One interesting feature of Moor J's analysis of relationship generated disadvantage was the way in which he quantified W's compensation. He noted that her earnings in-house were up to £150k per annum, and that netting that figure down would have given a similar award to what he gave her by way of a Duxbury fund.

2.8 He noted that W had benefited from H's earnings since she gave up work until judgment, given that he was awarding her 50% of the assets and making no adjustment for contribution.

2.9 He also accepted that H's income would likely fall at the end of four years (upon his reaching 20 years as a partner), and that various financial commitments in that period would represent a considerable drain on his income. He placed his calculation of W's award for this element of her case within that 4-year framework. However, he considered that there should be a clean break. To achieve this he ordered that the sum of £400k be paid to W from the proceeds of sale of the FMH (departing from equality to that degree, without which there would have been a 50:50 split).

2.10 This case is notable for its treatment of compensation – a concept which often gets a wince from judges when raised by parties. Parties invariably make sacrifices as part and parcel of a marriage, as practitioners will know very well. However that it typically taken within a "separate but equal" framework – no place for discrimination between the homemaker and the breadwinner. This judgment ascribes compensation not even to the demonstrable loss of a career – but the loss of a chance to have such a career.

2.11 Moor J specifically said that this is not to be taken as a "green light" for compensation to be resurrected – however many practitioners will no doubt be considering the position with many of their clients; how often does a client say that they would have had a high-earning job but for the joint decision not to work?

3. AGREEMENTS, MATRIMONIAL PROPERTY, WRONGFULLY OBTAINED DOCUMENTS

- *AD v BD [2020] EWHC 857 (Fam) (Mr Justice Cohen)*

3.1 This case covers a lot of ground, and includes Cohen J's analysis of H's very complex business interests and the beneficial ownership thereof. However it is an interesting case in three particular respects. Firstly, it begins with Cohen J's treatment of a pre-nuptial agreement which was signed the day before the parties were married. Secondly, it contains a treatment of matrimonial and non-matrimonial property. Thirdly, it deals with H and W's competing interpretations of the obligations upon parties when it comes to information wrongfully obtained.

3.2 W and H (35 and 36 respectively) began their relationship when they were teenagers. They both came from the wealthy elite of "Country A". After a short engagement the parties were married on 9 April 2010. They had two children, aged 7 and 5. They separated in October 2018.

Pre-nuptial agreement

3.3 In March 2010, W's father was diagnosed with an aggressive form of cancer. As a result H and W's plans to marry were accelerated. On 8 April 2010, the day before the wedding, H and W attended "MB" at his office and signed a document. It was H's case that this document was a binding matrimonial regime which bound the parties and which the court had to apply. The parties agreed that the marital regime was not discussed as part of the wedding planning. Cohen J accepted that it was only on the day before the wedding that H told W that they had to attend MB's office; and that it was only upon getting to the office that W first saw this document. He had not specified what those documents were.

3.4 In his judgment, Cohen J balanced the cultural context against W's particular circumstances. The separation of property is the norm in Country A. Indeed, 3 of H's 4 married siblings had signed such a document. The document she was asked to sign was clear in the sense that it plainly referred to a separation of property [25].

3.5 Against that, however, was W's turmoil on the date in question. She was getting married the next day; but her father was gravely ill. Such an agreement had never been discussed between the parties before. She had no chance to consider its contents and discuss them with her family. She was not even familiar with the concept of marital regime and as such had given no thought to the implications of the agreement [24].

3.6 In determining that this was an agreement to which he should not give weight, his Lordship distinguished *Versteegh v Versteegh* [2018] EWCA Civ 1050, in which Lady Justice King cautioned against adding a gloss to *Radmacher* so as to vitiate

agreements where the court is presented with an agreement which is commonplace, simply drafted, and generally signed without legal advice. He did so on the basis that unlike in *Versteegh*, W did not fully understand this agreement and had no proper opportunity to consider it [23].

Matrimonial property

3.7 H's father, "F", though not playing a direct role in the proceeds, was influential. He and H regularly butted heads in relation to business decisions. He was described in the judgment as "dictatorial" in his approach to the family's business dealings [72]. He "gifted" H £250,000 pa (which Cohen J readily found was remuneration labelled a gift to avoid tax) [74]. In September 2014 he provided H with £4.75m for the purchase of what became the family home. He later provided £500k for renovations.

3.8 Cohen J had to determine whether all or part of the FMH was matrimonial. His Lordship noted that F had provided each of his five children with substantial homes, and that in providing such a fund F had done no more than he had done for his other children [76]. He found that the entire purchase price and renovation costs had been provided by F to H as a gift, and accordingly had to approach the exercise on that basis.

3.9 His Lordship went on to consider whether the matrimonial home ought to be treated as matrimonial property, considering the dicta of Lord Nicholls *Miller/McFarlane* [2006] UKHL 24 [paras 22 – 25] and Lord Justice Nicholls in *K v L* [2011] EWCA Civ 550.

3.10 In rejecting W's argument and declining to treat the whole of the FMH as subject to equal sharing, Cohen J pointed out that it was bought only 3 years pre-separation with monies which came wholly from F; and that it was registered in H's sole name.

3.11 However, rather than go on to exclude the home in its entirety, Cohen J found 40% of the FMH to be matrimonial property. His Lordship did so firstly given the length of the marriage and the fact that there were 2 children; and secondly because

H's open offer conceived of W remaining in the FMH with the children until the younger child finished tertiary education (17 years).

3.12 Cohen J also exercised the principles of non-matrimonial property in respect of W's personal wealth. She had inherited a share of land from her father which technically made her wealthier than H (albeit that this wealth was largely tied up in assets which could not be sold for various reasons). H pointed to the unfairness in the expectation that he should make further provision for her. Cohen J commented as follows:

"The court's ultimate aim is to do fairness between the parties in all the circumstances of the case. Fairness is inevitably in the eye of the beholder and something upon which the parties are unlikely to agree….W is richer only by the happenchance that her parents were of different religions and under the law of Country A if W's father had left his assets to his wife, she would not in turn be able to leave them to the children….All that W has in her name has thus emanated from a non-matrimonial source."

Wrongfully obtained documents

3.13 In the lead up to H and W's separation, W began to suspect infidelity. In September and December 2018, she downloaded the contents of H's smartphone, asserting that she was looking for evidence of his infidelity. In the process of so doing she gained access to a large number of business documents. Upon being passed to her solicitors these documents gave rise to significant and detailed questionnaires; and H's business interests formed a significant part of the evidence before Cohen J.

3.14 W attempted to rely on *Imerman v Tchenquiz* [2010] 2 FLR 814 [42]:

"…it is and remains the obligation of a wife who has obtained access to her husband's documents unlawfully or clandestinely to disclose that fact promptly, either if asked by her husband's solicitors or at the latest and in any event when she serves her Questionnaire."

3.15 She argued that her duty to disclose what she had done was only engaged if she was specifically asked to provide such disclosure by her husband's solicitors or at the latest when serving her questionnaire. Cohen J roundly rejected this proposition [149]:

"How, I ask, can it be appropriate for a spouse who has obtained such documents wrongly to be allowed to retain them simply because the other spouse has not asked a question? After all, they should be of no use to W, as she is not entitled to look at them."

3.16 This case serves as a reminder that not only can wrongfully obtained documents not be relied upon; but that there is a positive duty to return originals and all copies to the other side or their solicitors. Cohen J clearly did not entertain W's fairly novel submission that there was a gloss on *Imerman* which permitted retention of wrongfully obtained documents in certain circumstances.

4. NON-FINANCIAL CONDUCT

- *FRB v DCA (No. 2)* [2020] EWHC 754 (Fam) (Mr Justice Cohen)

4.1 H and W were both from extremely wealthy Indian families – each putting the other's wealth in excess of £2 billion. At trial, it became apparent that their wealth was so significant that neither had any true idea of what they were spending each year. There was one child to the marriage, C.

4.2 One unusual feature in this case was the way in which conduct was raised. During the marriage, W had an affair. Entirely without H's knowledge, their child, C, was in fact not his biological child but that of another man (as established with paternity testing). W maintained that she was as surprised as anyone by the results; that she did not deny the affair but that it had never entered her mind that anyone other than H could be C's father. H contended that W's conduct was such that it would be inequitable for the court to disregard it.

4.3 He gave W's claims of surprise at C's paternity very short shrift: *"it would be naïve of me to find that it never crossed W's mind, as she claims, that anyone other than H might be the father of the unborn child. I regard that evidence as incredible."* [188]. He went on to acknowledge that H's discovery of the truth of C's paternity when C was 8 years old "had a devastating effect on him" [191]. He found that W's conduct in concealing the truth of C's paternity was so egregious that it would have been inequitable for him to disregard it.

4.4 The next difficulty was to determine the way in which W's conduct ought to be reflected in the quantum of the order. His Lordship observed that *"Reflecting in financial terms the cost of the emotional damage to H of the sort inflicted by W is like comparing apples and pears."* [197]. No doubt, this will very often be the case where a spouse is alleging conduct of a non-financial species. There is no guidance as to how such conduct should be reflected in the overall award.

4.5 In determining the correct approach, His Lordship balanced W's conduct against H's extensive non-disclosure. He observed that to both put a monetary figure on H's non-disclosure and to reduce W's award "would be to inflict a double-jeopardy" (para 198).

4.6 Post-FRB v DCA it would appear that there is still no guidance in how a judge ought to quantify non-financial conduct. The method adopted in FRB was to allow H to use W's conduct as a shield against some of his failures of disclosure. Therefore, non-financial conduct should certainly be pleaded and pursued; even if it does not lead to a blue-pen adjustment of the financial award, it may present as a mitigating feature to be taken into account in the judge's assessment.

5. PROCEDURAL DEVELOPMENTS

- *Amendments to Family Procedure Rules and consequent updating orders*

5.1 On 6 July 2020, the amendments to Family Procedure Rule 9.27 requiring the court to include costs details in orders, and the consequent revisions of Forms H and H1, come into force. With the agreement of the President of the Family Division,

Mostyn J has issued revised versions of Orders Nos 1.1, 1.2, 2.1, and 2.2. The announcement, and the orders, may be viewed and downloaded here.

5.2 These orders reflect the substitution of Family Procedure Rule 9.27 and the revisions of Forms H and H1. Specifically, rule 9.27(8) now requires the court to record in a recital to its order details of costs estimates/particulars filed. Rule 9.27(9) requires the court to record in a recital to its order any failure by any party to comply with the requirements to file estimates/particulars of costs.

5.3 Practitioners therefore must be aware of not just the duty to file cost estimates, but the new requirement to record a party's failure to file such estimates.

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